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TREASURY FOR IRS AND OASIA/ICB/P.MAIER
FRANKFURT FOR IRS/BARBARA FRANKLIN

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SUBJECT: Understanding Austria's New Tax Information Exchange
Process

REF: (A) VIENNA 1212; (B) VIENNA 1088

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¶1. SUMMARY: the Administrative Assistance Implementing Act (in effect since September 9, 2009) provides a new basis for handling foreign authorities' assistance requests for exchange of tax information. Where supported by appropriate bilateral agreements, Austrian authorities will provide information in cases of administrative tax proceedings -- including data formerly blocked by bank secrecy regulations, and not limited (as in the past) to criminal tax proceedings. Since the new procedure only applies for newly revised bilateral tax conventions, IRS/Treasury may wish to consider amending the U.S.-Austria tax conventions to take advantage of expanded information exchange opportunities. END SUMMARY.

¶2. This cable details Austria's new Law on Procedures for Administrative Assistance (ref A) and new procedures used by Austrian Finance Ministry (MoF) in responding to foreign tax authority requests for exchange of tax information. We based this analysis on GoA commentary attached to the bill (as sent to Parliament) and from an MoF expert presentation on October 8.

¶3. The new law regulates the implementation of OECD standards for cross-border information exchange in income and property tax matters pursuant to the OECD's Model Taxation Convention, particularly article 26. The law covers all kinds of mutual assistance ("letters rogatory") requests, from administrative assistance for tax assessment to criminal prosecutions -- importantly, requests need NOT/NOT involve criminal proceedings. Paragraph 38 of Austria's Banking Act, which regulates bank secrecy and requires initiated penal proceedings before releasing information (a very high barrier for foreign authorities) will NO LONGER APPLY in cases of foreign letters rogatory requests where supported by international agreements.

¶4. New or revised bilateral tax treaties will be the basis for implementing the new tax information exchange procedure, and will regulate the extent of assistance provided by the Austrian authorities. For foreign requests, the new procedures will apply beginning with the tax year AFTER a new/amended bilateral tax treaty goes into effect. There will be no retroactive application.

¶5. The MoF is currently the "responsible authority" for implementing the new procedure. An administrative assistance request from a foreign tax authority must be substantiated ("begrundet") and must fulfill certain conditions:

- it must be based on bilateral taxation conventions, EU Community law, or other international legal agreements; and
- it must provide an argument why the information requested is foreseeably relevant for tax assessment;

¶6. A request must include:

- a clear designation of the person(s) affected;

-- a statement that the requesting foreign authority has exhausted its domestic possibilities;
-- a statement that the foreign authority has reason to believe that the taxpayer has unlawfully avoided or withheld payment of a tax burden.
The MoF has emphasized that "fishing expeditions" by foreign tax authorities are NOT/NOT covered by the new law, nor is any automatic data exchange foreseen.

TIMETABLE FOR REQUESTS / APPEALS
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17. As responsible authority, the MoF will vet foreign requests for assistance and if procedurally correct, inform the accountholder(s) and bank(s) named in the request about the existence of a foreign administrative assistance request and the information sought. Within two weeks, the accountholder may ask the MoF for official notification that information exchange requirements are met. If notification is requested, then processing will start six weeks after the delivery of that notification. If the accountholder does not request notification, the MoF will start processing the foreign assistance request after expiration of the original two-week period.

18. If the accountholder files an appeal to Austria's Administrative Court or Constitutional Court (petitioning also for injunction), MoF processing of the foreign request must await a high court ruling. After all waiting periods and appeals are exhausted, the MoF will instruct Austrian bank(s) with relevant information to provide all available information, even data covered by bank secrecy.

19. The administrative process in Austria to obtain requested information will be the same as for a domestic case pursuant to paragraph 49/2 of the Federal Fiscal Code (in German: Bundesabgabenordnung). This also applies to criminal cases:

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domestic rules for administrative criminal procedures will apply for requests involving foreign administrative or judicial criminal proceedings.

HOH